



DEPARTMENT OF JUSTICE
CRIMINAL JUSTICE DIVISION

September 5, 2012

The Hon. Alex R. Gardner
Lane County District Attorney
125 E 8th Ave Rm 400
Eugene, OR 97401

Re: *Rob Handy*
DOJ Case No.: CPC0008-12

Dear Mr. Gardner,

You forwarded a citizen complaint and asked the Oregon Department of Justice (DOJ) to review the conduct of Lane County Commissioner Rob Handy in connection with his solicitation of several individuals to pay down a personal debt. We sent agents to Eugene who interviewed all involved parties, including Handy, and collected evidence. We have determined that insufficient evidence exists to prove that Handy violated any criminal laws.

SUMMARY OF FACTS

Rob Handy currently serves as an elected Lane County Commissioner; his term having begun January 5, 2009. On April 12, 2011, Handy was ordered personally liable to Lane County in the amount of \$20,000 for his role in violating public meetings laws. In order to collect this money award, Lane County arranged for an account to automatically deduct funds from each of Handy's county commissioner paychecks: this account is known as AR #0497.

In early 2012, Handy was engaged in a contested primary race to retain his seat as Lane County Commissioner. Sometime in mid-February 2012 Handy contacted John Brown, whom he knew from Brown's work as the vice president of the Eugene Water and Electric Board. Brown was also well known in Eugene as a real estate developer. Shortly thereafter, at Handy's request, Brown and Handy met at a coffee shop in Eugene.

At this meeting Handy asked Brown to contribute an unknown amount to Handy's re-election campaign. Also at this meeting, Handy asked Brown to contribute \$5,000 to Handy personally, by depositing money directly into AR #0497; thereby greatly reducing Handy's personal financial obligation to Lane County. Brown requested that Handy reduce the solicitation to writing for his consideration. Shortly thereafter, Handy sent Brown a handwritten letter on plain notebook-style paper reiterating the solicitation. This letter begins:

Thanks for considering making a contribution to my reelection campaign. Most of all, thanks for considering my request to pay off \$3,000 of my debt to Lane County incurred in public service – that became a 20,000.00 settlement ramification for the unfair result of the lawsuit.

On May 3, 2012 DOJ special agents interviewed Handy with his lawyer present. Handy admitted to the events summarized above. The agents expressly inquired whether Handy had any relationship with Brown whereby “their decisions or actions as elected officials could have a direct effect on one another’s business or community concerns.” Handy answered in the negative.

Information subsequently obtained by DOJ indicated that Handy and Brown worked together on preserving the McKenzie River and other water quality issues. Additionally, the agents noted a voicemail to Brown from Handy wherein Handy told Brown that he desired a “unified front” regarding “water related issues.”

On June 5, 2012, DOJ agents re-interviewed Handy to see why he had kept this information from them, despite their questions about his relationship with Brown. At that interview the agents noted that Handy appeared confused about the word “business.”

SUMMARY OF APPLICABLE LAW

In analyzing this case, we must determine whether there is sufficient evidence to prove, beyond a reasonable doubt, that Rob Handy committed any crime. In particular, we focused on Official Misconduct pursuant to ORS 162.405 and 162.415. For reasons that follow, we have determined there is insufficient evidence to meet this threshold.

Official Misconduct in the First Degree is defined by ORS 162.415:

- (1) A public servant commits the crime of official misconduct in the first degree if with intent to obtain a benefit or harm another:
 - (a) The public servant knowingly fails to perform a duty imposed upon the public servant by law or one clearly inherent in the nature of the office; or
 - (b) The public servant knowingly performs an act constituting an unauthorized exercise in official duties.
- (2) Official misconduct in the first degree is a Class A misdemeanor.

The Oregon Supreme Court has described the crime of Official Misconduct in the First Degree as set forth in ORS 162.415(1)(b) as consisting of the following elements:

- (1) The defendant must be a “public servant.”
- (2) He or she must knowingly perform an act.
- (3) The act must be performed “in” his or her official duties; that is to say, *in the defendant’s official capacity, exercising the powers or opportunities available by virtue of his or her official position.*
- (4) The act must be an unauthorized exercise of his official

capacity, power, or opportunity. (5) The act must be done “with intent to obtain a benefit or to harm another.”

State v. Florea, 296 Or. 500, 503-4, 677 P2d 698 (1984) (emphasis added). These five elements are required for a prosecution under ORS 162.415(1)(b).

Of particular note, the state must prove beyond a reasonable doubt that a person accused of Official Misconduct was acting in his or her official capacity during the relevant conduct. In *Florea*, the Oregon Supreme Court noted that “evidently the legislature intended to forbid unauthorized acts by officials *in the course of* exercising their official functions.” *Id.* at 503 (emphasis in original). Without evidence that a person was acting in their official capacity at the time of the alleged misconduct, a person cannot be held criminally liable for the crime of Official Misconduct.

As an example, in *State v. Davis*, 189 Or App 436 (2003) an off duty police officer, while being contacted about failing to purchase a train ticket, produced her badge from her purse, fidgeted with it, and tapped it on table. Later, after the train conductor told her the police had been called, she said “Who do you think you’re dealing with. I am the police department. I am the police.” The Court of Appeals held that the state failed to prove the defendant was acting in her official capacity at the time of the misconduct and overturned her conviction.

In its ruling, the *Davis* court emphasized the difference between a violation of ethics laws or personnel rules and the crime of official misconduct. The court noted:

[D]efendant may have abused the trust placed in her as a police officer by trying, while off duty, to use the fact that she was a police officer to be treated more favorably than a private citizen. Her conduct in that regard is not to be condoned and may have violated personnel policies and subjected her to employment-related sanctions or public ethics laws prohibitions. But her actions did not satisfy the elements of official misconduct in the first degree under ORS 162.415(1)(b).

Davis, 189 Or App at 443. Absent proof that a person is acting in their official capacity, the state cannot proceed with prosecution for Official Misconduct in the First Degree.

Official Misconduct in the Second Degree is defined in ORS 162.405:

- (1) A public servant commits the crime of official misconduct in the second degree if the person knowingly violates any statute relating to the office of the person.
- (2) Official misconduct in the second degree is a Class C misdemeanor.

Official Misconduct in the Second Degree is violated when a public servant knowingly violates any statute relating to the office of the person.

CONCLUSION

OFFICIAL MISCONDUCT IN THE FIRST DEGREE

ORS 162.415(1)(a)

There are no facts to suggest that Commissioner Handy failed to perform any of the duties imposed on him as a County Commissioner, which is required for a prosecution under ORS 162.415(1)(a).

OFFICIAL MISCONDUCT IN THE FIRST DEGREE

ORS 162.415(1)(b)

Based on a review of all the materials in this case, there is insufficient evidence to prove that Commissioner Handy was acting in his official capacity at the time he solicited funds (the third element required under *Florea*). There is insufficient evidence to prove beyond a reasonable doubt that any act was performed pursuant to Commissioner Handy's official duties or in his official capacity, exercising the powers or opportunities available by virtue of his official position. Commissioner Handy did not, in soliciting money, purport to undertake or perform any official responsibility, duty, function or role.

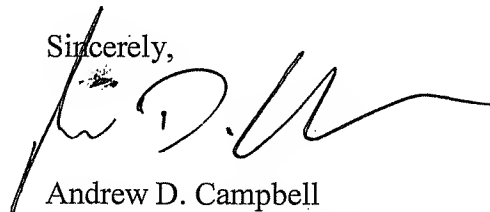
OFFICIAL MISCONDUCT IN THE SECOND DEGREE

ORS 162.405

There is insufficient evidence that Handy violated a statute that relates to his position as a County Commissioner for purposes of prosecution under ORS 162.405.¹

For these reasons we have determined that there is insufficient evidence to prove beyond a reasonable doubt that Handy committed Official Misconduct. Similarly, we found insufficient evidence to prove beyond a reasonable doubt that Handy committed any other crime. While his conduct may have violated personnel policies and ethics rules, it does not meet the criteria for criminal prosecution. As always, should you have any questions or concerns, please feel free to contact me.

Sincerely,



Andrew D. Campbell
Sr. Assistant Attorney General

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¹ There is a suggestion that Handy violated ORS 244.025 by soliciting a gift valued at more than \$50. However, even if this statute relates to the office of County Commissioner, there is insufficient evidence the person he solicited had a "legislative or administrative interest" as that term is defined by Oregon law.